IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 61.

JOHN H. CRUMADY,

Petitioner,

vs.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc., *JOACHIM HENDRIK FISSER*, and/or *HENDRIK FISSER*.

No. 62.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc., *JOACHIM HENDRIK FISSER*, and/or *HENDRIK FISSER*,

Petitioner,

vs.

NACIREMA OPERATING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR IMPLEADED RESPONDENT.

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BRIEF FOR IMPLEADED RESPONDENT.

Questions Presented.

1. Can a theory of unseaworthiness, first asserted on a petition for a rehearing in the Court of Appeals, which was predicated upon a mistaken interpretation of the trial court as to the absence of a conflict in the testimony concerning such theory afford the basis for a recovery without

a remand and a proper finding of fact resolving such controversy?

2. Is not the absence of a contract between a putative indemnitor and indemnitee fatal to the claim of indemnity where the parties are not mutually obligated to the injured person and the putative indemnitor is the employer of the injured person whose claim for damages is the basis for the assertion of the right to indemnity?

3. Even if the absence of such a contract is not fatal to the claim of indemnity, can one successfully assert such right to indemnity when his own fault contributed to the injuries against which indemnity is sought?

Statement of the Case.

The present action was instituted by a libel *in rem* as a result of which a stipulation for value was filed and the vessel was released from the custody of the marshal (R. 1). The libel sought to recover damages consequent upon injuries sustained by the libellant while aboard the vessel *Joachim Hendrik Fisser* which was alongside a bulkhead at Port Newark, New Jersey, on the navigable waters of the United States. The libellant contended that the injuries which he sustained occurred by reason of the falling of a boom at the No. 1 hatch during the course of his work as a longshoreman discharging a cargo of lumber from the vessel (R. 14).

It was contended by the libellant that the boom which was caused to fall fell because the topping lift, to the knowledge of the vessel's owner, was "worn, frayed and damaged" and that "the equipment attached to * * * the boom * * * was insufficient, defective and unsuited to handle

the transfer of the said cargo" (R. 16). The respondent and claimant asserted a claim for indemnification under the 56th Admiralty Rule against the impleaded respondent upon the vessel's contention that the "sole cause of the breaking of the topping lift, and the consequent falling of the boom, was the active negligence or improper conduct of the libellant's fellow employees in the handling of the cargo and unloading gear" (R. 16). It was not disputed that the libellant was in fact injured while engaged in the employ of the impleaded respondent as a longshoreman; that after the unloading operation of the craft had continued for approximately one hour the port boom fell into the No. 1 hatch.

At the trial, the testimony offered by the libellant was directed to two theories upon which a determination that the vessel was unseaworthy could be predicated. One was that Exhibits L-10 and L-13, which were conceded by all witnesses to be in such condition as to render their use as a topping lift unsuitable and dangerous (R. 17n), were, in fact, parts of the topping lift to which the port boom was attached on the day of the accident. The other theory of liability for unseaworthiness asserted by the libellant in the trial court was predicated upon the stipulation of the parties that the vessel provided an electric winch which was equipped with a device which interrupted its operation upon the application of a burden exceeding 100% of its capacity. Because of the fact that the gear and booms had a safe working load of 3 tons and the winch, which was the source of the power applied to such gear, had a capacity before the operation of the cutoff device of more than 6 tons, the theory was projected and accepted by the court that the vessel was unseaworthy because of this improper combination of gear (R. 32).

The respondent sought to escape liability for the alleged unseaworthiness of the vessel upon the theory that certain of the ship's tackle and gear were moved to an unseaworthy

position which was testified to by one of the ship's officers but which was sharply contradicted by the testimony presented on behalf of the impleaded respondent, (R. 52-57) and, in addition, contended that there was a jamming of two timbers under the coaming of the No. 1 hatch, as a result of which an undue strain was placed upon the topping lift.

The trial court, after evaluating the conflicting testimony concerning the topping lift (R. 17-24n), concluded that the wire submitted in evidence by the vessel and not Exhibits L-10 and L-13 was in fact the topping lift which parted on the day of the accident (R. 26) but accepted the alternate theory advanced by the libellant that the cutoff device by which the operation of the winch was automatically interrupted on the application of a burden exceeding the capacity of the winch (R. 16) combined with gear which could safely bear only one-half of such capacity rendered the respondent vessel unseaworthy (R. 32).

The trial court, in its opinion, recognized the conflicting testimony as to the alleged jamming of the timbers (R. 30) but ignored the conflict in the testimony as to the movement of the gear, stating that it appeared "without contradiction" that the gear was moved to a position (R. 29) which imposed an excessive burden upon the topping lift, as a consequence of which the injuries resulted from the active negligence of the impleaded respondent (R. 33) so to entitle the respondent to full indemnity against it (R. 35).

From the judgment thereupon rendered, all of the parties appealed to the Court of Appeals. The impleaded respondent alleged that the decision of the District Court was erroneous because of its failure to appraise the credibility of the conflicting testimony concerning the movement of the guy and preventer which was the subject of considerable testimony by the witness Manuel Costa who testified in detail as to the location of the guy and preventer

when the longshoremen first came aboard the craft on the day of the accident and the positions to which they were moved under his direction (R. 57-58) and that the position to which he moved the guy and preventer was the best position in order to work the gear on the ship, based upon his experience (R. 58). Since the decision of the Court of Appeals resulted in its determination to reverse the finding of the District Court that th. vessel was unseaworthy by reason of the winch cutoff device, the absence of an evaluation of the conflict in the testimony in respect of the positions to which the preventer and guy were moved by the employees of the impleaded respondent became immaterial, as did the correctness of the decision of the trial court with respect to the allowance of full indemnity against the impleaded respondent.

Not until the petition for rehearing in the United States Court of Appeals was the contention asserted by the libellant concerning the imposition of liability upon the vessel by the alleged improper movement of the preventer and guy. The impleaded respondent contends in those circumstances, particularly in the light of the failure of the trial court to appraise the conflict in the testimony concerning the vital question of whether or not the vessel was unseaworthy because of the movement of the guy and the preventer so to impose an excessive strain on the topping lift or because certain timbers were jammed under the coaming of the hatch in which the libellant was injured or a combination of those events, that it is essential that the trial court make a definitive appraisal of the testimony offered on behalf of the several parties in that respect. It further contends that if this court does resolve the question of unseaworthiness in favor of the libellant, the vessel, nevertheless, can not successfully cast the impleaded respondent in damages for full indemnity because the impleaded respondent and

the vessel were not under a mutuality of obligation to the libellant and there was no contract between the impleaded respondent and the vessel, the only contract being between the impleaded respondent and Insular Navigation Company (R. 26-103), which admittedly was the agent of the charterer of the vessel (R. 107).

Summary of Argument.

If this Court in case No. 61 accepts the contention of the libellant asserted for the first time in his petition for rehearing in the Court of Appeals that the vessel is unseaworthy because of the movement of the guy and preventer to an unseaworthy position by the employees of the impleaded respondent, the interest of justice requires a remand for a finding of fact upon that question, since the trial court failed to observe the conflict in the testimony offered by the vessel and by the impleaded respondent as to the position to which such gear was moved, merely observing that the testimony in that respect was uncontradicted (R. 29). Regardless, however, of the disposition of the question of the unseaworthiness of the vessel, its claim against the impleaded respondent in indemnity as a matter of law and fact is not sustainable in the present action.

Implicit in the doctrine of indemnity is that a cause of action therefor must stem from a contract, either express or implied. A contract to indemnify is implied in law only where two persons are under a legal obligation to a third person who has been injured. In such circumstances, the one who is cast in damages to the injured person without actual culpability but because of a non-delegable legally imposed duty is entitled to indemnity from one whose negligent conduct caused the injury, *Inhabitants of Lowell* v.

Boston and Lowell R. R. Corp., 23 Pick (Mass.) 24. Since the libellant is an employee of the impleaded respondent, the only obligation it owes to him for the injuries sustained is that imposed by the Longshoremen's and Harbor Workers' Compensation Act. As a consequence, there is no mutuality of obligation between the respondent impleaded and the vessel to respond to the libellant in damages. The vessel's obligation, if it is not grounded upon negligence, must be predicated upon the unseaworthy character of the craft. The impleaded respondent owes no duty to its employee either in negligence or for unseaworthiness of the vessel upon which the employee works. Moreover, any obligation imposed upon the impleaded respondent by reason of an injury sustained by its employee is expressly prohibited by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act unless there is a contract within the holding of this Court in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124.

Admittedly, the only contract to which the impleaded respondent was a party was a simple stevedoring contract without an express provision for indemnity which was made between it and an agent of Insular Navigation Company which was the agent of the charterer of the vessel. While the *Ryan* case determined that the immunity conferred upon a stevedore employer by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act did not prevent its voluntary acceptance of an additional obligation by contract, that case does not support the imposition of liability upon a stevedoring employer for indemnity asserted by a vessel with whom it had no contractual relationship.

The mere existence of a charter-party has been held insufficient by this court to constitute the charterer a third-party beneficiary of a contract to repair the vessel made

between its owner and a dry dock company so to permit the charterer to recover for the loss of the benefits of the charter during the making of repairs to a propeller which was damaged by the negligence of the dry dock company, *Robbins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303.

The obligation owed by the charterer to the owner of the vessel cannot be resolved in this court since the charterer is not a party to the present action and the charter-party is not before the court. There is no basis upon which a determination can be made that the charterer would be liable to the vessel or its owner since neither the law applicable to the charter-party nor the tribunal which may be called upon to resolve such controversy is known to this court, and hence, the assumed cause of action based upon the equitable principle of avoiding circuity of action is not available to support the allowance of indemnity. Whether a charterer is obliged under substantive law to discharge maritime liens against the vessel during the period of the charter affords no ground for the allowance of indemnity in the present case, since no lien either maritime or otherwise arising out of the present action is asserted by the libellant, since while a monition *in rem* originally issued, a stipulation for value resulted in the discharge of the lien and the release of the craft (R. 1).

Even if the absence of a contract is not regarded as fatal to the claim of the vessel to indemnity, its improper combination of a winch with the capacity of six tons as an integral part of gear capable of sustaining a burden of only three tons prevents the allowance of indemnity in the absence of a specific undertaking to that effect since that result would permit the vessel to be indemnified against its own fault.

ARGUMENT.

Under the circumstances in the present case, there is no basis either in the facts or in substantive law for an award of indemnity against the impleaded respondent.

The only direct concern of the impleaded respondent in the controversy in case No. 61 stems from the right to indemnity which is asserted in the cross petition based upon the assumption that the result reached in the United States Court of Appeals for the Third Circuit will be altered by this court. The only observation which appears necessary to make in that respect is that the theory of unseaworthiness now asserted by the libellant concerning the responsibility of the vessel resulting from the assumed movement of the gear which it is contended resulted in an excessive burden upon the topping lift causing it to part was not asserted by the libellant in the trial court and was first incorporated in its petition for rehearing after the adverse determination of the Court of Appeals. Because of the failure of the trial court to appraise the conflicting testimony offered on behalf of the vessel and on behalf of the impleaded respondent concerning the position to which the guy and preventer were moved, if such movement is to be the basis upon which the claim of unseaworthiness is to be resolved and possibly subject the impleaded respondent to ultimate liability to the vessel, such result should not be accomplished without a remand to the trial court to resolve the conflict in the testimony and to make findings of fact thereon.

There is no more reason in the factual testimony presented to assume that the topping lift parted by reason of an excessive strain placed upon the topping lift by

reason of an assumed location of the preventer which would render it useless (R. 58) than to conclude that it parted either because the timbers were jammed or because the vessel improperly integrated a winch with a capacity of 6 tons with gear which could bear safely only 3 tons. While the conclusion reached by the trial court concerning the unseaworthy character of the vessel by reason of the cut-off device on the winch was supported by testimony which under the decision of this court in *McAllister* v. *United States*, 348 U. S. 19 will not be altered upon appeal unless it is clearly erroneous, its finding that there was an absence of a conflict in the testimony concerning the location of the preventer and guy is clearly erroneous and if the former conclusion of the trial court is reversed, the latter conclusion can not be supported in the present state of the record without further factual findings which would review and resolve the conflicting testimony in that respect.

(a) Indemnity can be awarded only if there is a contract, express or implied, between the parties.

It is admitted that the only contract involved in the present case was a simple stevedoring agreement which did not contain an express provision for indemnity. It was made between the impleaded respondent and the Insular Navigation Company on December 30, 1953 (R. 96). That contract was offered in evidence at the trial of the matter but was excluded upon timely objection by the impleaded respondent (R. 108). It was conceded by counsel for the vessel upon the trial of the action that Insular Navigation was acting as agent for the charterer in executing the contract (R. 107). In those circumstances and because the libellant is an employee of the impleaded respondent, there is no legal basis for the imposition of liability in favor of the vessel, for to do so violates the immunity afforded by

the Congress to the impleaded respondent in respect of liability for injuries sustained by its employees in circumstances where such employer has not voluntarily by contract consented to such imposition of an additional liability in favor of the putative indemnitee and there is no legal relationship between the parties which gives rise to indemnity as a matter of law. The contention of the vessel in the present case, in which the United States as *amicus curiae* joins, would extend the liability first accepted by the majority of this court (with four Justices dissenting) in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124 to permit a vessel which has not contracted with a stevedore company to extend the obligation of such company to discharge the liability of the vessel which has been imposed against it by reason of its obligation to provide a seaworthy craft. In that respect it is the ultimate extension of the devices used by vessels to escape liability predicated upon the doctrine of unseaworthiness.[1]

The doctrine of indemnity, in the absence of an express contract, had its origin in what was said to be a common-law principle stemming from implied contracts. In circumstances where two persons were under a legal obligation

[1] At one time by reason of the so-called "control test", a vessel was able to escape liability to a person injured if its unseaworthiness resulted from the fault of persons other than the vessel or its crew, particularly when the damage resulted from the improper use of equipment which was not under its control, *The Hindustan*, 37 Fed. (2d) 932, aff'd. memo 44 Fed. (2d) 1015 (CCA 2d); *Long* v. *Silver Line*, 48 Fed. (2d) 15 (CCA 2d). That doctrine, however, was determined to be erroneous in *Petterson* v. *Alaska S. S. Co.*; 205 Fed. (2d) 478 (9th Cir.), aff'd. memo 347 U. S. 396, and no longer can be used to exculpate the ship, *Feinman* v. *A. H. Bull S. S. Co.*, 216 Fed. (2d) 393 (3d Cir.).

To accomplish a similar result, the admiralty doctrine of contribution in collision cases was used to limit the pecuniary responsibility of the vessel, but that device was held to be inapplicable to non-collision cases; and hence, contribution was not permitted where both the vessel and others were guilty of negligence, *Halcyon Lines* v. *Haenn Ship. etc. Corp.*, 342 U. S. 282.

to a third person, the one who was held liable to the injured person without actual culpability but because of a breach of a non-delegable legally imposed duty was held to be entitled to indemnity from one whose conduct caused the injury. Typical of such cases is the situation in which a statutory obligation is imposed upon a municipality in the maintenance of highways. When such municipality is liable in damages to a person injured in consequence of the defective condition of such highway, which condition was caused by the negligence of a person hired by the municipality to perform work thereon, a municipality, nevertheless, is permitted to recover from such negligent person that which it has been obliged to pay to him who was hurt. Such was the decision in the early case of the *Inhabitants of Lowell* v. *The Boston and Lowell R. R. Corp.*, 23 Pick. (Mass.) 24.

The principle thus established was considered an exception to the general rule that there could be no contribution between participants in a criminal action or between joint tort feasors. To permit recovery, the existence of liability to the person injured and the imposition of damages upon one who was guilty of no active misfeasance but whose obligation to the injured party was imposed by operation of law without moral fault were required, *Westfield* v. *Mayo*, 122 Mass. 100. However, if the party who sought indemnity was guilty of a breach of duty in its own right to the injured person, implied indemnity is not permitted; and the general rule which precludes contribution between joint tort feasors is applicable, *Union Stockyards Co.* v. *Chicago etc. R. R. Co.*, 196 U. S. 217. Cf. *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316.

In the absence of a contractual undertaking, it appears manifest that there can be no indemnity awarded against an employer in consequence of injuries sustained by its employee when such employee is covered by the Longshore-

men's and Harbor Workers' Compensation Act, for unless circumstances exist which afford a basis for the application of the common-law doctrine of indemnity exemplified by the foregoing decision of the *Inhabitants of Lowell* v. *Boston and Lowell R. R. Corp., supra,* there is no substantive right of action therefor.[2]

The doctrine that a contractual or other special relationship between the parties was not essential to indemnity, represented by the decisions of *U. S.* v. *Rothschild International Stevedoring Co.*, 183 Fed. (2d) 181 (9th Cir.) and *States S.S. Co.* v. *Rothschild International Stevedoring Co.*, 205 Fed. (2d) 253 (9th Cir.), which was at one time apparently accepted in the Ninth Circuit before the decision in *Ryan Co.* v. *Pan-Atlantic Corp., supra,* appears to have been repudiated by the decision in that Court of *American President Lines* v. *Marine Terminals Corp.*, 234 Fed. (2) 753 (9th Cir.), cert. den'd. 352 U. S. 926; and the concurring opinion in *States S.S. Co.* v. *Rothschild International etc., supra,* which recognized the necessity for a contractual or special relationship upon which the indemnity can be grounded, is now accepted in that circuit.

The applicable principles were well stated in *Crawford* v. *Pope & Talbot, Inc.*, 206 Fed. (2d) 784 (3d. Cir.), where it was said at page 792:

> "* * * Section 5, [33 U. S. C. A. §905], however, does not insulate the employer from all liability to a third party from whom an employee has recovered

[2] This principle was recognized in the cases of *Slattery* v. *Marra*, 186 Fed. (2d) 134 (2d Cir.), certiorari den'd. 341 U. S. 915, and *Brown* v. *American-Hawaiian S. S. Co. et al.*, 211 Fed. (2d) 16, 18 (3d Cir.). To like effect see: *Lo Bue* v. *U. S.*, 188 Fed. (2d) 800 (2d Cir.); *American Mutual* v. *Matthews*, 182 Fed. (2d) 322 (2d Cir.); *Read* v. *United States*, 201 Fed. (2d) 758 (3d Cir.); *Crawford* v. *Pope & Talbot, Inc.*, 206 Fed. (2d) 784 (3d Cir.); *Bordal* v. *Atlantic Maritime Co., Inc. et als.*, 127 F. Supp. 186 (E. D. Pa.). See also: *103 U. of Pa. L. Rev. 321 (1954); 70 Harv. L. Rev. 149 (1956).*

damages. See United States *v.* Arrow Stevedoring Co., 9 Cir., 1949, 175 F. 2d 329, 332. Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party. Claims for full indemnity arising out of such contractual relations have *not* been considered barred by the section. See Rich *v.* United States, 2 Cir., 1949, 177 F. 2d 688. The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case the indemnitee has a claim which is independent of and does not derive from the injury to the employee, except in a remote sense not within the provisions of Section 5. • • •'" (Brackets ours.)

To like effect is the opinion in *Brown* v. *American-Hawaiian SS. Co., supra*, at page 18 [of 211 Fed. (2d)]

"• • • There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employee for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the *Crawford* case: there can be no action of indemnity in these cases which is not based on the violation of

> some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. Pope & Talbot, Inc. *v.* Hawn, 346 U. S. 406, 412, 74 S. Ct. 202. * * *"

Those decisions were cited with approval in *Hagans* v. *Farrell Lines*, 237 Fed. (2d) 477 (3d Cir.).

Nor does the majority opinion in *Ryan* v. *Pan-Atlantic Corp., supra*, afford any support for the contention that in the absence of a contract between the parties indemnity can be allowed against an employer who is subject to the liabilities imposed by the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424 *et seq.* as amended, 33 U. S. C. §901 *et seq.*). That the Congress in adopting the Longshoremen's and Harbor Workers' Compensation Act contemplated thereby to abolish any other liability to its employees other than that created by the Act is evident.[3] While the *Ryan* case must be regarded as establishing the principle that the immunity conferred upon employers subject to the Act would not prevent the voluntary creation of an additional right by contract, such result in the absence of an express undertaking in the said

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[3] In Senate Report 973, 69th Cong., 1st Sess. 16 (1926) the following comment appears:

> "Sections (4), (5), and (6) of the bill contain the appropriate provisions for making certain that the compensation will be paid, *abolishing liability* on the part of the employer except for the payment of the prescribed compensation, and fixing the time at which compensation begins." (Emphasis supplied.)

contract to benefit others than those who are parties thereto would seem to impose upon a covered employer a liability "on account of an employee's injury" within the prohibition of Sec. 5 of the Act.[4] Not only does the express limitation of an employer's liability to his employee which is prescribed by the Longshoremen's and Harbor Workers' Compensation Act prevent indemnity because of such express limitation but it also precludes the assertion of an obligation for indemnity based upon the principle of

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[4] While the decisions under State Workmen's Compensation Acts are not uniform, the overwhelming majority (9—2) of the decisions appear to exclude liability of an employer in an action asserted against it by one cast in damages for injuries sustained by an employee in the absence of a contract between the parties. See: (Maryland) *Baltimore Transit Co.* v. *State*, 183 Md. 674, 39 A. 2d 858; (Ohio) *Bankers Indemnity Ins. Co.* v. *Clevsland H & F Co.*, 77 Ohio App. 121, 62 N. E. 2d 180; (South Carolina) *Burns* v. *Carolina Power & Light Co.*, 88 Fed. Supp. 769 (EDSC); (New Mexico) *Hill Lines, Inc.* v. *Pittsburgh Plate Glass Company*, 222 Fed. (2d) 854 (10th Cir.); (North Carolina) *Hansucker* v. *High Point Bending & Chair Co. et al.*, 237 N. C. 559, 75 S. E. 2d 768; (Oklahoma) *Peak Drilling Co.* v. *Halliburton Oil Well Cement Co.*, 215 Fed. (2d) 368 (10th Cir.); (New Jersey) *Public Service Electric and Gas Co.* v. *Waldroup*, 38 N. J. Super. 419, 119 A. 2d 172 (App. Div.); (Colorado) *Ward* v. *Denver & R. G. W. R. Co.*, 119 Fed. Supp. 112 (D. Colo.); (Texas) *Westfall* v. *Lorenzo Gin Company*, Tex. Civ. App. , 287 S. W. 2d 551 (not officially reported); *contra* (New York) *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation*, 278 N. Y. 175, 15 N. E. 2d 567; (Minnesota) *Lunderberg* v. *Bierman*, 241 Minn. 349, 63 N. W. 2d 355. It also strongly appears that California would follow the majority rule. *Baugh* v. *Rogers*, 24 Cal. 2d 200, 148 P. 2d 633, 152 A. L. R. 1043. The case of *American District Telegraph Co.* v. *Kittleson*, 179 Fed. (2d) 946 (8th Cir.) has been cited as following the minority view, but it has been correctly observed that in that case there actually was a contract between the parties. See: *Calvery* v. *Peak Drilling Co.*, 118 Fed. Supp. 335, 339 (W. D. Okla.). The Longshoremen's and Harbor Workers' Compensation Act has also been interpreted to exclude such liability on the part of the employer. *Standard Wholesale Phos. & A. Wks.* v. *Rukert Term. Corp.*, 193 Md. 20, 65 A. 2d 304. It is interesting to note that all these cases holding the employer's compensation payments to exclude all other liability were decided after the *Westchester* case, *supra*, in which there was a vigorous dissent by Chief Judge Crane.

implied contract, for by definition an employer owes no duty to his employee in negligence, and accordingly, an evaluation of active and passive negligence which was referred to by the trial court (R. 33) is inapposite since if there is no duty to respond in negligence there can be no breach of that duty which requires a relative evaluation thereof.

(b) Indemnity can not be justified upon the theory that the vessel is a third-party beneficiary of the stevedoring contract.

Both the vessel and the *amicus curiae* seek to justify indemnity in the present action upon the theory that the vessel is a third-party beneficiary of the stevedoring contract. The vessel seeks to ground its contention that it occupied the position of such beneficiary because the contract, itself, referred to the vessel by name, and consequently, it is said a duty to it arose therefrom.[5] Neither the vessel nor the *amicus curiae* points to any testimony which would support the contention of either as to the intended beneficiary of the contract, and it would seem evident from the admitted nature of the relationship between the contracting parties, namely, one being a stevedore and the other an agent of the charterer, that there is no compelling reason to conclude that it was the intention of the charterer to benefit anyone other than itself in entering into the

[5] Why the mere identification of a place at which work should be performed should have that effect is not disclosed by the vessel. The significance which the *amicus curiae* professes to find in the answer of the impleaded respondent to Article Eleventh of the libel is equally obscure. Since the stevedoring contract was signed by J. J. Smith on behalf of Insular Navigation Company (R. 103), which admittedly was the agent of the charterer of the vessel (R. 107), and not by any employee or agent of the owner, the employer of the master and crew of the vessel manifestly has no significance in the resolution of the intended beneficiary of that agreement.

agreement. Presumably, mercantile considerations which suggested the commercial prudence of entering into the charter-party motivated the contract between the charterer and the stevedoring company. There would seem to be no more reason to regard the vessel as being the beneficiary of the stevedoring contract in the absence of an express provision to that effect than there would be to assume that the charterer entered into a charter-party to benefit the owner rather than to create a profit thereby for the charterer. Nor can the document, itself, be said to suggest any intention of the parties to benefit any persons other than those who were parties to the undertaking. Had it been the intention of the charterer to confer a benefit upon the vessel by reason of its contract, it would have been a simple matter so to provide. If the vessel wished to be the beneficiary of a stevedoring contract, it could have made its designation as a beneficiary of such agreement a condition of the charter-party. Had that course been followed in the present case, the question of the intention of the parties to benefit the vessel would squarely have been presented and the impleaded respondent would have had an opportunity either to refuse to perform the work, being exposed to such greater liability than that to which it would normally be exposed, or, it could agree to do so upon an appropriate increase in its rates therefor. To suggest that the contract between the impleaded respondent and the agent of the charterer should be treated as if such provisions were contained in that agreement and in the charter-party has not the support of any substantive law or any considerations of economic or social policy.[6] That a third-party benefi-

[6] Neither the vessel nor the *amicus curiae* have pointed to any economic or social considerations which would make vessels as a class less able than stevedoring contractors to bear economically the losses sustained by persons injured thereon because of the unseaworthy condition of the craft.

ciary of a contract must establish more than a simple desire to profit by agreements entered into by others would seem to be an essential limitation of the doctrine which has been present since its inception.

The principle is well stated in *2 Williston on Contracts*, §356A (Rev. Ed.):

> "• • • It is commonly said that such a beneficiary must be a third person whom the contracting parties 'intend' shall receive a 'direct benefit' from the promise."

See also: *Restatement of Contracts* §133.

Factually similar to the present case and directly contrary to the contention that the relationship between an owner and charterer itself is sufficient to predicate a third-party beneficiary relationship is the decision of *Robbins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303. There the time charterers of a steamship sought to recover from a dry dock company damages for loss of use of the steamer upon which work was being performed by the dry dock company in accordance with a contract which that company made with the owner of the vessel. Pursuant to that contract, the vessel was docked and its propeller was damaged by reason of the negligence of the dry dock company, causing the vessel to remain out of service, to the damage of the charterers. Mr. Justice Holmes, speaking for the court, denied the charterers' claim that they were third-party beneficiaries of the contract even though the charter-party provided for repair of the vessel every six months, saying:

> "• • • But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract 'or in any respect beneficiaries' and were not entitled to sue

for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. (2d) 4. 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit.' (Citations omitted)"

Similarly in *Isbrandtsen Co.* v. *Local 1291 etc.*, 204 Fed. (2d) 495 (3 Cir.) it was held that a time charterer of a vessel was not such a beneficiary of a stevedoring contract made between a stevedoring company and a voyage charterer of the same vessel, even though the voyage charterer by reason of the charter-party was to load and unload the vessel, so to permit the time charterer to recover damages for failure of the stevedoring company to unload the vessel in accordance with its agreement.

(c) The principle of avoiding circuity of action affords no support for the allowance of indemnity in the present case.

It is contended by the *amicus curiae* that to permit recovery in indemnity would avoid circuity of action. Such argument quite obviously is without merit in the instant case for there is no way to resolve the question of whether the charterer would be liable to the vessel if the vessel is liable in damages to the libellant in the present action. The charterer is not a party to the present action, and the charter-party is not before the court. The law governing the performance of the charter-party and the rights and liability of the parties thereto are likewise matters which can not be resolved, for there is a complete absence of any proof in the record concerning them. While the equitable principle founded upon the avoidance of multiplicity of suits is a recognized ground for relief, it is manifest

that before the doctrine is called into operation as a matter of fact or substantive law there must be a foundation for the assertion of the right for the enforcement of which judicial action is invited. The principle is stated in *19 Am. Jur. 96, Equity* §*83* as follows:

> "The prevention of circuity of action is a recognized ground of equitable jurisdiction. The chancery court will settle in one suit the diverse rights and obligations of persons who are successively liable and will impose liability on the one who is ultimately liable at law."

An early example of its correct application is found in *Riddle & Co.* v. *Mandeville and Jemesson*, 9 U. S. (5 Cr.) 322, in which a holder of a promissory note was permitted to maintain an action against a remote endorser thereof.

Whatever may be the obligation of a charterer to the owner of a vessel in respect of the discharge of maritime liens either by terms of the charter-party, itself, or by reason of general maritime law can not be utilized as the basis for the assumption that the vessel in the present case could maintain an action in some court upon some theory of law, for in fact there currently is no maritime lien against the *Joachim Hendrik Fisser*. As has been observed earlier, a stipulation for value has been filed, and the vessel was released (R. 1). To assume without any proof that a cause of action exists in such circumstances as between the vessel and its charterer or the latter's agent, Insular Navigation Company, where neither the theory of the cause of action nor the identity of the nation in whose tribunals such right might ultimately be asserted is indeed a fragile foundation upon which to project a cause of action upon the equitable theory of avoiding circuity of actions.

(d) If it should be determined that the vessel was unseaworthy because of the combination of gear with a safe working load of three tons with a winch which did not cease operation until the application of six tons, to permit recovery would permit the vessel to avoid liability occasioned by its own fault.

If the absence of a contract between the claimant and the respondent impleaded does not prevent indemnity as a matter of law, if the vessel were unseaworthy because of the combination of the winch with gear which safely could be operated at only one-half the capacity of the winch, it is manifest that the vessel thus seeks indemnity against the results of its own culpable act and in such situations even if there is a contract between the putative indemnitor and indemnitee recovery is not permitted in the absence of a definitive expression of such intention by the parties. In the instant case, there was a complete absence of testimony that the stevedores were aware of the fact that the automatic cutoff device was not designed to operate until a burden in excess of twice the safe working load of the gear would be applied. Because of the absence of such knowledge, the usual circumstances in which a vessel has been permitted to obtain indemnity against the stevedore employer exemplified by the decisions in *Ryan Stevedoring Company* v. *Pan-Atlantic SS Corp., supra,* are not present. As was said by Judge Swan in *American Mut. Liability Ins. Co.* v. *Matthews,* 182 Fed. (2d) 322, (2d Cir.) at page 324:

> "• • • In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect

any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable. Hence we can find no contractual basis for indemnity or contribution. * * *"

A similar result was reached in *Hagans* v. *Farrell Lines, supra,* where it was held that when a vessel was guilty of negligence in providing a defective winch it could not escape liability for its own fault since its liabilty to the injured person was not based solely upon the improper conduct of fellow employees of the person injured. See also: *Torres* v. *The Kastor,* 227 Fed. (2d) 664, (2d Cir.); *Autobuses Modernos, SA* v. *The Federal Mariner,* 125 Fed. Supp. 780 (ED Pa.).

Since the right to indemnity depends upon the terms of the contract between the vessel and the indemnitor, several decisions have even refused to permit recovery upon a written agreement in circumstances similar to the instant case. In *Compania Anonima Venezolana* v. *Cottman Company,* 145 Fed. Supp. 761, (D. C. Md.), the court refused to construe a written contract of indemnity to impose an obligation to indemnify the owner of the vessel when the contract to indemnify was made with a charterer.

In *Amador* v. *The Ronda et als.,* 146 Fed. Supp. 617, (S. D. N. Y.) a vessel was held not to be entitled to indemnity where it had improperly stowed cargo which was unloaded by the respondent impleaded and caused injury to one of the latter's employees. The court said at page 620:

"* * * * * * * In short, the stowage was improper, should the strips be discharged over the tops of the

coils * * *.' The strips were discharged over the tops of the coils, and in these circumstances, ' * * * the way they were discharged was as much a part of the stowage, as is the proximity of perishable cargo to cargo that will injure it.' 224 F. 2d 437, 440. Accordingly, the stowage was characterized as dangerous. And as the Court of Appeals also pointed out, ' * * * the situation is to be distinguished from one in which the longshoremen were merely negligent in discharging a well stowed cargo.' If the stevedore is to be held liable on an implied obligation, that obligation must have included moving the coils out from under the square of the hatch before the strips were discharged, or discharging the coils and then reloading them after the strips were discharged. Such an implication would impose an obligation on the stevedore to supply the condition that would render the stowage proper; that is, the stevedore would by implication be held responsible for saving the shipowner from negligence in providing an unseaworthy ship * * *."

Since the stevedores in the present case used a winch which was provided by the vessel without knowing of its inherent defect in relation to the remaining gear which was attached to it, even an express contract of indemnity would not be construed to absolve the vessel of the consequences of its own fault unless such intention was expressly set forth in the instrument itself. In the instant case since there is no contractual relationship between the vessel and the respondent-impleaded, to imply any such undertaking is manisfestly lacking in any basis, either factual or legal.

Conclusion.

For the reasons herein expressed and without regard to the disposition of case No. 61, the claim of the cross-petitioner for indemnity should be denied.

Respectfully submitted,

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